No. 12181

# In the United States Court of Appeals for the Ninth Circuit

TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF THE HOUSING EXPEDITER, APPELLANT

*v.*

H. M. GOCHNOUR AND MRS. H. M. GOCHNOUR, HIS WIFE, APPELLEES

*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION*

## BRIEF FOR APPELLANT


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# INDEX



## TABLE OF AUTHORITIES





831741—49——1

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## BRIEF FOR APPELLANT

### STATEMENT OF THE CASE

This is an appeal by the Housing Expediter, plaintiff below, from a final judgment of the United States District Court for the Eastern District of Washington, Northern Division (R. 16), which refused to award restitution of rent overcharges to a tenant in an action brought pursuant to Sections 205 (a) of the Emergency Price Control Act, as amended (50 U. S. C. App. Secs. 925 (a)) (R. 13).

Plaintiff filed suit against defendant on July 12, 1948 (R. 2). The complaint contained two causes of action, one under the Emergency Price Control Act of 1942, as amended (R. 2) and the second under the

831741—49——2

Housing and Rent Act of 1947, as amended. The action under the Housing and Rent Act of 1947, as amended, is not involved in this appeal.

For the first cause of action plaintiff alleged that defendants were the landlords of one 2-story dwelling house and six frame houses situated in Route 4, Pierce Street, Wenatchee, Washington, within the Wenatchee Defense-Rental Area (R. 3); that defendants had violated the provisions of the Emergency Price Control Act and the regulations issued pursuant thereto by collecting rents in excess of the maximum legal rentals established for House #1, from April 1, 1947 to June 30, 1947 at the rate of $18.50 per month, or a total of $55.50 (R. 3) and by collecting rents in excess of the maximum legal rentals established for House #6 from August 1, 1945 to June 30, 1947 at the rate of $15.00 per month, or a total of $345.00 (R. 4).

In his prayer on the first cause of action plaintiff prayed for the entry of an order requiring and directing the defendants to repay to the tenant of House #1 overcharges in the sum of $55.50 and to the tenant of House #6 overcharges in the sum of $52.50 (R. 5).

On August 6, 1948 defendants filed a motion to dismiss the complaint (R. 7). After argument the Court filed an opinion refusing to order restitution on the ground that there was no justification for such an exercise of the equity powers of the court after termination of the Emergency Price Control Act of 1942, as amended (R. 8).

On January 14, 1949 the Court entered an order dismissing the first cause of action and denying the

motion to dismiss the second cause of action and ordering the defendants to file an answer to the second cause of action in two weeks (R. 13).

Plaintiff has appealed (R. 16) from that part of the order which reads: "First: That Defendants' Motion To Dismiss Plaintiff's first Cause of Action be, and the same herewith is, granted" (R. 16).

## POINTS RELIED ON

I

The District Court erred in dismissing first claim stated in Plaintiff's Complaint on ground that action for equitable relief in nature of restitution did not survive termination of Emergency Price Control Act of 1942, as amended.

II

The District Court erred in holding that no action for equitable relief under Section 205 (a) of Emergency Price Control Act of 1942 could be brought and carried on after termination of that Act.

## ARGUMENT

I

**The District Court erred in dismissing first claim stated in plaintiff's complaint on ground that action for equitable relief in nature of restitution did not survive termination of Emergency Price Control Act of 1942, as amended**

The facts established for the purposes of this appeal are that, during the period when the Emergency Price Control Act of 1942, as amended (hereinafter referred to as the Act), was in effect, defendants collected excess rents on houses #1 and #6, Pierce Street, Wenatchee, Washington. More than a year

after the Act had terminated plaintiff sued defendants, seeking to compel them to make restitution under Section 205 (a) of the amounts collected in excess of the maximum rents established under the Act.

Plaintiff relied on Sections 1 (b), 4 (a), and 205 (a) of the Act which read as follows:

> SECTION 1 (b). The provisions of this Act, and all regulations, orders, price schedules, and requirements, thereunder, shall terminate on June 30, 1947, or upon the date of a proclamation by the President, or upon the date specified by a concurrent resolution of the two Houses of the Congress, declaring that the further continuance of the Authority granted by this Act is not necessary in the interest of the national defense and security, whichever date is the earlier; except that as to offenses committed, or rights or liabilities incurred, prior to such termination date, the provisions of this Act and such regulations, orders, price schedules and requirements shall be treated as still remaining in force for the purpose of sustaining any proper suit, action or prosecution with respect to any such right, liability or offense.
>
> SECTION 4 (a). It shall be unlawful, regardless of any contract, agreement, lease or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule

effective in accordance with the provisions of section 206, or of any regulation, order or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt or agree to do any of the foregoing.

SECTION 205 (a). Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order or other order shall be granted, without bond.

The opinion of the trial court shows the single issue upon which he based his ruling dismissing the complaint as to the first cause of action. It is that an order of restitution under section 205 (a) is not a "proper suit, action or prosecution" with respect to an offense committed or right or liability incurred prior to the termination of rent control so that it survives the expiration of the Act.

The Court stated that prior to June 30, 1947, a proper action for restitution could have been sustained and cited *Porter* v. *Warner Holding Co.,* 328 U. S. 395. It also agreed that, under *Creedon* v. *Randolph,* 165 F. 2d 918 (C. C. A. 5th), there would have been no statute of limitations applicable to such action. It held, however, that neither of the cited cases was authority for permitting the bringing of

such an action after the termination of the statute since both had been commenced and disposed of in the trial court prior to June 30, 1947. The wording of section 1 (b) makes no such distinction. If a right was incurred prior to June 30, 1947, section 1 (b) says that the provisions of the Act shall be treated as remaining in force to sustain a proper suit with respect thereto. It does not exclude Section 205 (a) from its saving power. Section 205 (a) is clearly one of "the provisions of the Act" mentioned in Section 1 (b), which are treated as remaining in effect.

As the Supreme Court stated in *Fleming* v. *Mohawk Co.,* 331 U. S. 111, at p. 119:

> Liabilities incurred prior to the lifting of controls are not thereby washed out. *United States* v. *Hark,* 320 U. S. 531, 536; *Utah Junk Co.* v. *Porter,* 328 U. S. 29, 44; *Collins* v. *Porter,* 328 U. S. 46, 49. And Congress has explicitly provided that accrued rights and liabilities under the Emergency Price Control Act are preserved whether or not suit is started prior to the termination date of the Act.

See also, *Gordon* v. *Porter,* 156 F. 2d 799 (C. C. A. 9th) and *Porter* v. *Provenzano,* 159 F. 2d 47 (C. C. A. 9th) Cert. den. 331 U. S. 816.

If there was a liability before June 30, 1947 nothing occurred on that date or thereafter to destroy it. That a liability had been created for which the remedy was a suit in equity for an order enjoining restitution is clear not only from *Porter* v. *Warner Holding Co., supra,* and *Creedon* v. *Randolph, supra,* but also from *Bowles* v. *Skaggs,* 151 F. 2d 817 (C.

C. A. 6th), a suit against an executor of an estate who sold a single refrigerator at an over-ceiling price. In a suit under Section 205 (a) for restitution alone the District Court refused to take jurisdiction. The Court of Appeals reversed saying: "To deny the Administrator power to act in cases where, as here, restitution rather than a prohibitory injunction is the only *remedy,* would be to subvert the purposes of the Act." (Italics added.)

The case of *United States* v. *Carter,* decided by the Court of Appeals for the Fifth Circuit, 171 F. 2d 530, although it arose under the Veterans' Emergency Housing Act of 1946, is authority for appellant's position. In that case the United States sued to compel restitution of overcharges made on the sale of houses to veterans. Suit was brought after the repeal of the provisions of the Veterans' Emergency Housing Act which authorized the regulation of maximum prices for houses erected with priorities assistance. The only saving clause was Title 1, Section 109 U. S. C. A. which is the general saving clause as to any repealed legislation.[1] The Court below dismissed on the ground that the repealing Act had not saved the remedies. The Court of Appeals reversed on the ground that the remedies remained in effect. The court's action is wholly inconsistent with the theory that restitution is dependent upon the existence of an act whose enforcement may be bolstered by its use.

In the case of *Keele* v. *Holt,* 171 F. 2d 980 (C. C. A. 5th), the Court awarded restitution to purchasers of

[1] See Appendix, p. 14.

overpriced houses a year after the pertinent regulations and statutes had expired.

The specific point was raised in the case of *Creedon* v. *Brooks* in the Northern District of Indiana (No. 812 Civil) where restitution to the tenant under section 205 (a) was ordered in a suit commenced after July 1, 1947. The Court of Appeals for the Seventh Circuit affirmed from the bench on October 13, 1948 (Civil No. 9589, not yet reported). By its affirmance, the Seventh Circuit Court gave tacit approval to the following language contained in the memorandum opinion and order of the Court below:

> The defendant also contends that because this action was commenced after July 1, 1947, only the tenant is entitled to bring an action under the provisions of the Housing and Rent Act of 1947. This suit is brought under the Emergency Price Control Act of 1942 for alleged violations occurring while that Act governed maximum legal rental charges in defense-rental areas. Section 1 (b) of the Act, Title 50, War App. U. S. C. A. Par. 901 (b), clearly shows that Congress intended violations of the Emergency Price Control Act to be prosecuted after termination of the statute and in accordance with its provisions. (Unreported memorandum opinion by Judge Luther M. Swygert, October 30, 1947, in *Creedon* v. *Raymond Brooks,* No. 812 Civil, N. D. Indiana, South Bend Division.)

See also, *Woods* v. *Boyle,* 77 F. Supp. 881 (W. D. Mich.), in which in a suit commenced on October 3, 1947, the Court awarded restitution in the amount of $400 for overcharges under the Emergency Price Control Act and $650 under the Housing and Rent

Act of 1947. The award was affirmed *per curiam* by the Court of Appeals for the Sixth Circuit on February 7, 1949 (Civil No. 10760, not yet reported). The point at issue here was not however raised by the appellant landlord.

Similarly, on November 17, 1948, this Court in *Woods* v. ***Rose,*** 171 F. 2d 290 (C. C. A. 9th), remanded a complaint for trial without comment, although it included a cause of action under Section 205 (a) of the Emergency Price Control Act.

In *Woods* v. *Turner,* 172 F. 2d 313 (C. C. A. 10), the only remedy sought was restitution. The suit was not filed until September 1947, after the termination of the Emergency Price Control Act and the Court of Appeals remanded the case to the District Court for determination of the amount to be restored to the tenants under Section 205 (a) of the Emergency Price Control Act.

Contrary to the view expressed below, the case of *Creedon* v. *Randolph,* 165 F. 2d 918 (C. C. A. 5th), does not justify the conclusions reached in this case. It is true that the case was commenced prior to June 30, 1947, and that it came before the District Court in May 1947. However, the trial court ordered judgment to be entered for the defendant because no present violations were threatened; they could not have been in view of the imminent expiration of the Act. Argument in the appellate court occurred in the fall of 1947. In January 1948, we find the appellate court reversing the trial court, saying:

> The remedy invoked under section 205 (a) appertains only to the Administrator as rep-

On April 11, 1949, the District Court for the Western District of Washington (Judge Lloyd Black sitting) in Woods v. Allen (No. 2095 W.D. Wash.) awarded restitution in a similar case relying on Fleming v. Mohawk

> resentative of the Government in the enforcement of *this law*. That to require restitution of overcharges tends to enforce the law prohibiting them, no one would deny.

If the Court of Appeals had agreed with this District Court's belief that restitution is an equitable remedy to be exercised only in respect to an existing law, its proper action would have been to affirm the judgment for defendant, since there was no existing law to be enforced in January 1948. Instead of doing so, however, it reversed, saying "here the Administrator did not ask for a prohibitory injunction against future violations, and probably would not have gotten it if he had;" doubtless, because the Act had expired.

But although there was no legislation which required enforcement and no prohibitory injunction was appropriate, the Court still granted restitution as a continuing equitable remedy after the expiration of the Act, in order to bring about defendant's compliance with the Act.

## II

**The District Court erred in holding that no action for equitable relief under Section 205 (a) of Emergency Price Control Act of 1942 could be brought and carried on after termination of that act**

The District Court considered itself without authority to exercise its equitable jurisdiction under the provisions of Section 205 (a) because the Act had expired. It refused to give any weight to the argument propounded by plaintiff below that orders entered under Section 205 (a) would be an effective aid in the enforcement of the Housing and Rent Act of

1947. This argument should have been considered and enlarged upon. As the Supreme Court emphasized in *Porter* v. *Warner Holding Company, supra,* the public interest is involved.

> It is readily apparent * * * that a decree compelling one to disgorge profits, rents or property acquired in violation of the Emergency Price Control Act may properly be entered by a District Court once its equity jurisdiction has been invoked under Section 205 (a).
>
> * * * * *
>
> When the Administrator seeks restitution under Section 205 (a) he does not request the court to award statutory damages to the purchaser or tenant or to pay to such person part of the penalties which go to the United States Treasury in a suit by the Administrator under Section 205 (e). Rather he asks the court to act in the public interest by restoring the status quo and ordering the return of that which rightfully belongs to the purchaser or tenant. Such action is within the recognized power and within the highest tradition of a court of equity. * * *

Or as the Court stated in *Schine Chain Theatres* v. *United States,* 334 U. S. 110, at p. 128, in discussing divestiture, "Like restitution it merely deprives a defendant of the gains from his wrongful conduct. It is an equitable remedy designed in the public interest to undo what could have been prevented had the defendants not outdistanced the government in their unlawful project."

Surely the extension of the provisions of the Act to secure the enforcement of accrued liabilities will

not be complete if the Government is prevented from overtaking those defendants who originally outdistanced them. On the contrary unless the Government can vindicate the public interest in this manner, unscrupulous persons will be encouraged to anticipate the termination of every legislative program by a few weeks or months knowing that the probabilities are that in the closing days of a program, officials will be too preoccupied to exercise the same vigilance as they had previously shown and that on the fatal day they will have nothing more to fear from courts of equity. The outdistancing will not be temporary but permanent.

In the instant case, the situation is presented in its clearest aspect. There never was an end of the Rent Control program. The rates and registrations of the Emergency Price Control Act were carried over to the Housing and Rent Act of 1947 (Section 204 (b) (1)).[2] The provisions of the latter were carried back to the former. Courts of equity were given the same type of equitable jurisdiction under both statutes, and the same construction previously given by the Courts to Section 205 (a) of the Emergency Price Control Act has now been given to Section 206 (b)[3] of the Housing and Rent Act of 1947, *Woods* v. *Hillcrest Terrace,* 170 F. 2d 980 (C. C. A. 8th). Congress could not have intended to so restrict the equity jurisdiction of the Federal Courts from doing complete equity, nor may any such restriction upon

[2] See Appendix, p. 14.

[3] See Appendix, p. 15.

the broad powers of the equity courts be implied (cf. *Hecht* v. *Bowles,* 321 U. S. 321, 329 et seq.).

## CONCLUSION

It is respectfully submitted that the Court below erred in dismissing plaintiff's first cause of action and that the judgment should be reversed with instructions to the District Court to take jurisdiction to determine whether or not orders of restitution in the amounts of $55.50 and $52.50 should be entered.

Respectfully submitted.

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## APPENDIX

### Title 1 U. S. C.

§ 109. Repeal of statutes as affecting existing liabilities.

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. July 30, 1947, c. 388, § 1, 61 Stat. 633.

Housing and Rent Act of 1947, as amended.

> § 204 (b) (1) Subject to the provisions of paragraphs (2) and (3) of this subsection, during the period beginning on the effective date of this title and ending on the date this title ceases to be in effect, no person shall demand, accept, or receive any rent for the use or occupancy of any controlled housing accommodations greater than the maximum rent established under the authority of the Emergency Price Control Act of 1942, as amended, and in effect with respect thereto on June 30, 1947: Provided, however, That the Housing Expediter shall, by regulation or order, make such indi-

vidual and general adjustments in such maximum rents in any defense-rental area or any portion thereof, or with respect to any housing accommodations or any class of housing accommodations within any such area or any portion thereof, as may be necessary to remove hardships or to correct other inequities, or further to carry out the purposes and provisions of this title. In the making of adjustments to remove hardships due weight shall be given to the question as to whether or not the landlord is suffering a loss in the operation of the housing accommodations.

§ 206 (b) Whenever in the judgment of the Housing Expediter any person has engaged or is about to engage in any act or practice which constitutes or will constitute a violation of any provision of this title, he may make application to any Federal, State, or Territorial court of competent jurisdiction, for an order enjoining such act or practice, or for an order enforcing compliance with such provision, and upon a showing by the Housing Expediter that such person has engaged or is about to engage in any such act or practice a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

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